IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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| MICHAEL KATZENMOYER, | ) | |
| CHARLOTTE KATZENMOYER | ) | Civil Action |
| v. | ) | |
| | ) | No. 00-5574 |
| CITY OF READING, ET AL. | ) | |

**MEMORANDUM**

**Padova, J.** **September , 2001**

Defendants move for summary judgment on Counts VII and VIII of the Amended Complaint. For the reasons that follow, the Court grants Defendants' Motion and grants judgment in favor of Defendants on these counts.

## I. Background

In Count VII, Plaintiff Charlotte Katzenmoyer ("Katzenmoyer") brings a claim under § 1983 and the First Amendment. Specifically, Katzenmoyer alleges that Defendants City of Reading ("City"), Mayor Joseph Eppihimer ("Eppihimer") and Jesus Pena ("Pena") refused to promote her to the position of City Engineer in retaliation for filing and maintaining a lawsuit against them. In Count VIII, Katzenmoyer seeks "mandatory injunctive relief" in relation to the claims made in Count VII.

In her response to Defendants' Motion, Plaintiff argued that the existing record provided sufficient basis to deny the motion, but, in the alternative, asked that the Court defer disposition of the Motion until discovery had been completed. The Court deferred

judgment under Rule 56(f) until the completion of discovery, and set a deadline for the filing of supplemental memoranda. On August 30, 2001, Defendants filed a supplemental brief, but Plaintiff did not, thus choosing to rely on her prior submission.[1]

**I. Legal Standard**

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial Celotex burden can be met

[1]By letter to the Court dated September 7, 2001, Plaintiff's counsel confirmed that she would not be filing any supplemental materials in opposition to the Motion for Partial Summary Judgment.

simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325. After the moving party has met its initial burden, "the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). That is, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. Under Rule 56, the Court must view the evidence presented on the motion in the light most favorable to the opposing party. Anderson, 477 U.S. at 255. "[I]f the opponent [of summary judgment] has exceeded the 'mere scintilla' [of evidence] threshold and has offered a genuine issue of material fact, then the court cannot credit the movant's version of events against the opponent, even if the quantity of the movant's evidence far outweighs that of its opponent. Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1363 (3d Cir. 1992).

**II. Discussion**

Section 1983 of Title 42 of the United States Code provides a remedy against "any person" who, under the color of law, deprives another of his constitutional rights. 42 U.S.C. § 1983 (1994). Courts apply a three-step, burden-shifting analysis for retaliation

claims made pursuant to the First Amendment under § 1983. Mount Healthy City Sch. Dist. Bd. of Ed. v. Doyle, 429 U.S. 274, 285-86 (1977); Watters v. City of Philadelphia, 55 F.3d 886, 892 (3d Cir. 1995). First, the plaintiff must show that she engaged in conduct or speech that is protected by the First Amendment. Id. Second, the plaintiff must show that the defendant responded with retaliation, and that the protected activity was a substantial or motivating factor in the alleged retaliatory action. Anderson v. Davila, 125 F.3d 148, 161 (3d Cir. 1997); Watters, 55 F.3d at 892. Third, the defendant may defeat the plaintiff's claim by demonstrating by a preponderance of the evidence that the same action would have been taken even in the absence of the protected conduct. Watters, 55 F.3d at 892.

Defendants contend they are entitled to judgment because Plaintiff cannot establish that an adverse employment action was taken against her. (Def. Mot. at 11.) Specifically, Defendants contend that Plaintiff cannot demonstrate that she was entitled to or had a property right in the position, because she lacked the necessary professional licensing. In such a § 1983-First Amendment claim, however, a plaintiff need not demonstrate she was entitled to the promotion. See Rutan v. Republican Party of Illinois, 497 U.S. 62, 72 (1990) (citing Perry v. Sinderman, 408 U.S. 593, 596-98 (1972)); Suppan v. Dadonna, 203 F.3d 228, 234 (3d Cir. 2000)(rejecting the argument that the First Amendment rights of

public employees had not been infringed because they were not entitled to promotion, transfer, or rehire). Retaliatory conduct falling within the scope of § 1983 and the First Amendment is conduct that would "deter a person of ordinary firmness from exercising his First Amendment rights." Suppan, 203 F.3d at 235. "[T]he First Amendment . . . protects from . . . even an act of retaliation as trivial as failing to hold a birthday party for a public employee . . . when intended to punish her for exercising her free speech rights." Rutan, 497 U.S. at 76 n.8.

Defendants further contend, however, that they are entitled to judgment because Plaintiff cannot adduce evidence that there is a causal link between Plaintiff's exercise of First Amendment rights and Defendants' failure to promote her. The Court agrees. In a First Amendment retaliation case, the plaintiff has the initial burden of showing that the constitutionally protected conduct was a "substantial" or "motivating factor" in the relevant decision. Mount Healthy, 429 U.S. at 287. It is sufficient if a plaintiff establishes that the exercise of the First Amendment rights played some substantial role in the relevant decision; a plaintiff need not establish that the retaliation was motivated solely or even primarily by the protected activity. Id. at 270-71.

In response to Defendants' Motion, Plaintiff presents evidence consisting of an affidavit and a city job description. In order to be considered on summary judgment, facts set forth in affidavits

must be such that they would be admissible in evidence. Fed. R. Civ. P. 56(e) ("Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.") Of Plaintiff's many averments, only a few appear to suggest any link to her filing and maintenance of the law suit with the decision not to promote her:

> 6. Mr. White told me on numerous occasions that Mr. Eppihimer told him that I would not be elevated to the position of Director Public Works unless and until my husband Michael Katzenmoyer withdrew his law suit against the City of Reading.
>
> 7. Mr. White also advised me that Mayor Eppihimer would claim that I could not be elevated to the position of Director of Public Works because I did not yet have my Professional Engineer's license. Mr. White told me on more than one occasion that this was not true. He said Mayor Eppihimer told him that the basis for the denial of the promotion was the existence of Michael Katzenmoyer's law suit.
>
> 11. I had several conversations with Jeffrey White about my selection as Director of Public Works and was advised by him, . . . that the reason I was not selected was in retaliation for my support of my husband Michael Katzenmoyer in his legal action against the City of Reading.
>
> 12. Mr. White made clear to me that my support of as well as my association with Michael Katzenmoyer and his law suit made me unacceptable [sic] Joseph Eppihimer
>
> 19. I spoke with Eppihimer about becoming Director of Public Works because of the Professional Engineer's license requirement of the City Charter he said "you know that is not the case."

Pl. Answer to Def. Mot. for Summ. Judgment Ex. A. None of these statements, however, are made on the affiant's personal knowledge; they are hearsay statements that would not be admissible into

evidence. Plaintiff's only other submission – the job description – sheds no light as to causation. The Court concludes that Plaintiff's submissions are insufficient to show that there is a genuine issue of material fact as to the issue of whether Plaintiff's lawsuit was a substantial motivating factor in Defendants' decision not to promote her. Accordingly, the Court concludes that Defendants are entitled to judgment on Count VII. The Court also grants judgment in favor of Defendant on Count VIII, insofar as entitlement to the relief sought in Count VIII depends on proof of the claim in Count VII.

An appropriate Order follows.

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**ORDER**

**AND NOW,** this day of September, 2001, upon consideration of Defendants' Motion for Partial Summary Judgment (Doc. No. 21), any responses thereto and all attendant briefing, **IT IS HEREBY ORDERED** that said Motion is **GRANTED**. Judgment is entered in favor of Defendants on Counts VII and VIII of the Amended Complaint.

BY THE COURT:

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John R. Padova, J.